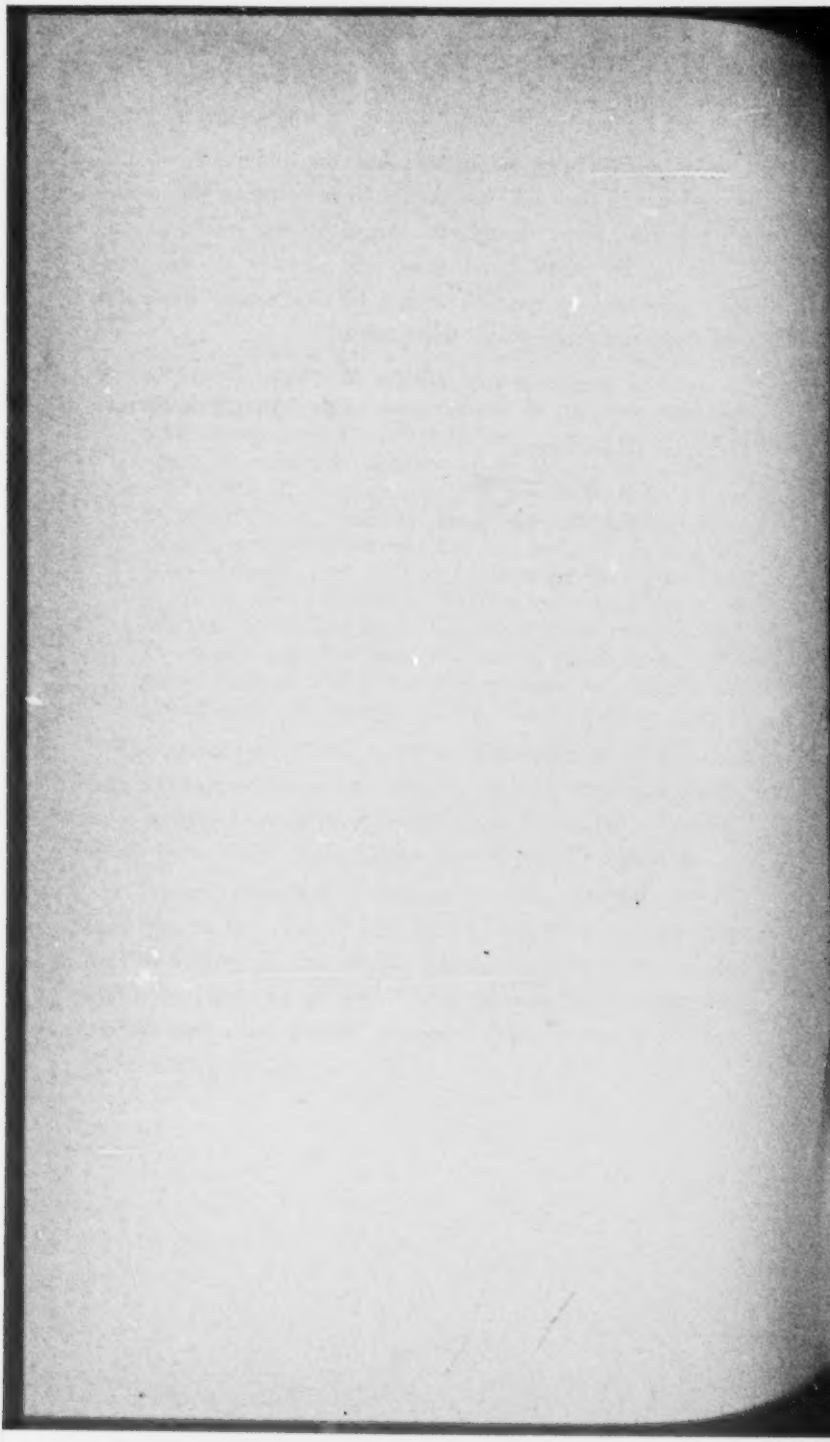

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SUPREME COURT U. S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 19.

AUGUST CLIFF, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

PETITION FOR REHEARING AND MOTION TO RECALL MANDATE.

JOHN MAYNARD HARLAN,
Attorney and Counsel for Plaintiff in Error.

WASHINGTON, OCTOBER TERM, 1904.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15332

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PETITION FOR REHEARING AND MOTION TO RECALL MANDATE.

Now comes the said plaintiff in error, by his attorney and counsel, and moves that the mandate of this honorable court in said cause be recalled, and respectfully petitions this honorable court for a rehearing of said cause, and in support of his petition begs leave to present the reasons following.

JOHN MAYNARD HARLAN,
Attorney and Counsel for Plaintiff in Error.

This case was heard simultaneously with three others, in which the grave constitutional questions involved were of such absorbing interest and importance as to exclude a full presentation on the oral argument of the merits of this case arising upon the *interpretation* of the oleomargarine law which the court has since upheld as being in accord with the Constitution.

Therefore, inasmuch as the decision of the question arising in this case under the oleomargarine law may be regarded as controlling a case in which the writer's client is concerned, involving a large amount of money and now pending in the circuit court of the United States for the northern district of Illinois, it is respectfully urged that the allowance of opportunity for an oral argument in this case, to be confined exclusively to the question arising under the oleomargarine law itself, and without attempting to reopen discussion of the constitutionality of that law, might subserve the ends of justice without prejudice to the interests of the Government and at the cost only of a slight trespass upon the time of the court.

Considerable time having elapsed since this case was decided, it seems well here to restate the case.

STATEMENT.

The pertinent provisions of the oleomargarine law (as amended in 1902) are as follows:

Section 2 reads:

> "That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine,

and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

In section 8 is the following provision:

> "That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound.*"

Section 11 reads:

> "That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense."

By section 14 the Commissioner of Internal Revenue—

> "is authorized to decide what substances, extracts, mixtures or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health."

Plaintiff in error was charged with having knowingly purchased and received for sale "certain oleomargarine which had not been stamped according to law—that is to

say, ten pounds of a mixture and compound composed, as he, the said August Cliff, well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt, and palm oil (which said last-named ingredient, to wit, palm oil, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow), which said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid by William J. Moxley" * * * and that said oleomargarine "was contained in a new wooden original manufacturer's package to which, as he, the said August Cliff, then and there well knew, no coupon stamp or stamps, in the sum of ten cents for each pound of oleomargarine so contained therein, then and there had been or was affixed by the said manufacturer, or by any other person, for denoting the payment of the internal-revenue tax on the oleomargarine so contained therein."

The Government's evidence showed that the ten-pound package bore tax-paid stamps at the rate of one-fourth of a cent per pound, and that otherwise "the package was marked, stamped, and branded in every respect in accordance with the acts of Congress relating to oleomargarine and the regulations of the Secretary of the Treasury and the Commissioner of Internal Revenue;" that "the contents of the package was composed of oleo oil, neutral lard, cotton-seed oil, milk, common salt, and palm oil;" that the palm oil caused said oleomargarine to look like butter of "a shade of yellow," and that the information charging as a violation of law the purchasing and receiving for sale of the ten-pound package without the payment of a tax of ten cents per pound was based (Pr. Rec., p. 8) upon a ruling of the Commissioner of Internal Revenue, contained in his letter addressed to Mr. W. J. Moxley, under date of August 11, 1902, which ruling was as follows:

> "This office rules that where so minute and infinitesimal a quantity [in that instance one-third of one per cent.] of a vegetable oil is used in the manufacture of oleomargarine, as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and therefore that the oleomargarine so colored is not free from artificial coloration, and becomes subject to the tax of ten cents per pound" (Pr. Rec., p. 10).

The Governmment affirmatively disavowed any claim that Cliff had offered the article for sale as butter (Pr. Rec., p. 10).

For the convenience of the court its opinion, affirming the judgment of the lower court, sentencing the defendant under section 11 above quoted, is printed as an appendix to this petition.

REASONS FOR A REHEARING.

The court's opinion, if the writer correctly apprehends it, might be stated in the form of a syllogism, thus:

The first premise would be, to use the court's language:

> "When any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to look like butter of any shade of yellow, it is an artificial coloration."

Second premise: The palm oil used in the oleomargarine purchased and received for sale by the plaintiff in error "substantially served only the function of coloring the mass" to look like butter of a shade of yellow.

Conclusion: Therefore said oleomargarine was not free from artificial coloration and was subject to a tax of ten cents per pound, and the plaintiff in error, having knowingly purchased and received for sale said oleomargarine stamped only at the rate of one-fourth of a cent per pound, violated the statute and was lawfully found guilty of the offense charged and sentenced to pay a fine.

To establish the first premise in this syllogism, the court says:

> "It is true that under the last clause of section 2 oleomargarine includes 'all mixtures and compounds' of the substances named, 'made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter,' and that palm oil is a vegetable oil, one of those substances. But in this enumeration Congress included not only those substances which, entering into the composition of oleomargarine, make it suitable for food, and, so to speak, form its body, but also others used only for coloring. After naming some it adds specifically, 'and other coloring matter.' The purpose in so including 'coloring matter' is obvious. It was to prevent excluding from the operation of the statute anything in its nature oleomargarine by the addition of a substance not in reality an ingredient, but serving substantially only the purpose of coloring the product to cause it to look like butter. The fact that one of the ingredients of this compound is palm oil does not show that such oil does anything else than color the product composed of other ingredients, and if it does substantially only this it is rightfully styled an artificial coloration. Otherwise the proviso practically nullifies the body of the section. For 'other coloring matter' includes all coloring matter, at least all of the nature of those named; and hence the addition of any coloring matter would produce only a natural and not an artificial coloration, and thus relieve the product from the ten-cent tax. It will be noted that the regular tax imposed upon oleomargarine by section 8 is ten cents a pound, the exception thereto being stated in the proviso, and a party who claims the benefit thereof must make it

> clear that his oleomargarine is within its scope. That exception is 'when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow.' Bearing in mind also that one of the purposes of this legislation was to prevent the sale of oleomargarine as and for butter, it must be held that when any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to 'look like butter of any shade of yellow,' it is an artificial coloration" (195 U. S., 163).

The writer begs leave to say that the fallacy of this argument and of the proposition or first premise stated above, which it is intended to establish, lies—

(1.) In a misconception of the term "other coloring matter," leading as a consequence to a misinterpretation of the term "artificial coloration."

(2.) In a misapplication of the rule that a party who claims the benefit of an exception must make it clear that he comes within the exception. That rule does not apply to this case.

(3.) In the erroneous assumption that there is a causal relation between the *amount* of the revenue tax paid on oleomargarine and the accomplishment of the purpose of the act "to prevent the sale of oleomargarine *as and for butter*."

I.

As to "Annotto and Other Coloring Matter."

The theory of the court's opinion in this case seems to be that any substance which imparts color is within the term "other coloring matter" as used in the statute, and if it serves substantially only the purpose of coloring the product

so as to cause it to look like butter of a shade of yellow, then such color-giving substance is artificial coloration.

The clause in the court's opinion, "For 'other coloring matter' includes all coloring matter, at least of the nature of those named," indicates that the court regarded as "coloring matter" all, or at least more than one, of the substances named in the section. But the fact is that *annotto* is the only "coloring matter" specifically named in the section; for with the exception of *annotto* all the substances named specifically in section 2 of the act are fats or oils. Properly speaking, a fat or an oil is not and cannot be called a "coloring matter," even if such fat or oil, as used in the oleomargarine, "substantially serves only the function of coloring the mass and so as to cause the product to look like butter of any shade of yellow." It is not the *motive* with which a particular substance is used in a specific case nor the quantity used, but it is rather *the inherent nature of the substance itself* that determines its classification. If inherently the substance is a fat or an oil, then it does not become a "coloring matter" merely because only a small quantity of it is used and even though the motive in using it is to make the oleomargarine "look like butter of any shade of yellow."

An oil is generically different from a coloring matter. Coloring matter is a pigment or dye, and never an oil. A natural oil, like palm oil, has its pigment, which gives to the oil the color which is native to and characteristic of that oil. The oil has its pigment or coloring matter dissolved in it by nature, but the oil itself is not coloring matter. The color may fade away, but the oil remains; or if the coloring principle native to any oil could be extracted the substance thus procured might be called "coloring matter," but the oil would still remain. In short, the fats and oils, including vegetable oil, mentioned in the statutory definition of oleomargarine are, properly speaking (and as described by

this court in *McCray v. United States*, 195 U. S., 27), "authorized ingredients not artificially colored," but each one having its own color due to the presence in it of a natural pigment. It follows, therefore, that resemblance to butter of a "shade of yellow" due to the use in the oleomargarine of palm oil which, being vegetable oil, is one of these "authorized ingredients not artificially colored" does not make the palm oil an "artificial coloration" merely because the quantity of palm oil used is small and the purpose of its use is to impart to the oleomargarine the color native to that oil. On the other hand "annotto and other coloring matter" are neither fats nor oils, and, properly speaking, are not "authorized ingredients," but are authorized "coloring matter" which imparts artificial coloration to the oleomargarine in which it is used and subjects such oleomargarine to a Government tax of ten cents per pound; and the words "other coloring matter" include all substances "of the nature of" *annotto*, which is the only "coloring matter" specifically named in the statute.

If the words "other coloring matter" had been omitted, then when some "coloring matter" or dye other than *annotto*—as, for instance, the "Wells-Richardson Improved Butter Color"—was used it might have been claimed that the product was not oleomargarine within the meaning of the statute; and it was to prevent any such claim that the words "other coloring matter" were added, thus embracing all coloring matters of the nature of *annotto*, the *one* "coloring matter" specifically mentioned.

With this distinction between "authorized ingredients" and authorized "coloring matter" kept clearly in mind, it is apparent that the proviso in section 8 does not nullify the preceding part of that section. For oleomargarine in which *annotto* or "other coloring matter" is used will be subject to the tax of ten cents per pound because *annotto* or "other coloring matter" of the nature of *annotto* is "artificial coloration." On the other hand, oleomargarine composed

exclusively of "authorized ingredients not artificially colored" will be subject only to the tax of one-fourth of a cent per pound, even though such oleomargarine "look like butter of any shade of yellow" and regardless of the quantity used of that particular "authorized ingredient not artificially colored" that may be used to impart the color.

This distinction between "authorized ingredients" and authorized "coloring matter" seems to have been clearly contemplated by the court in the *McCray* case, for it entirely accords with the reasoning of the court in its opinion in that case where the court said:

> "Nor is there force in the contention that the plain meaning of the statute is overcome by an amendment to which it was subjected. Before the amendment relied on, the proviso read as follows: '*Provided*, When oleomargarine is free from coloration *or ingredient* that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound.' By the amendment the word 'ingredient' was stricken out, thus leaving the proviso in the form in which it was enacted. The proposition is that the elimination of the word 'ingredient' compels to the conclusion that wherever artificial coloration in the finished product of oleomargarine was produced by artificial coloration used in an authorized ingredient, that such coloration was not artificial within the statute. But this disregards the fact that butter, both when artificially colored and when not so colored, was made an authorized ingredient of oleomargarine. If then the word 'ingredient' had not been stricken out, it might have given rise to the contention that the imparting of a yellow color to the finished product of oleomargarine by the use in its manufacture of spring butter of a natural yellow color would have caused the product oleomargarine to be artificially colored within the statute. As the manufacturer of oleomargarine was permitted to use either butter not artificially colored or butter so colored, the effect of striking out the word 'ingredient' operated simply to render it *certain* that

> the finished product, *even although of a yellow color*, would be within the proviso where the color was imparted *by an authorized ingredient not artificially colored*. This overthrows the contention that the finished product, when not free from artificial coloration, must be treated as free from such coloration, because the color was derived from an artificially colored though authorized ingredient."

It is, then, to use the court's language in the *McCray* case, "certain that the finished product, even although of a yellow color, would be within the proviso [that is, taxable only at one-fourth of a cent per pound] where the color was imparted by an authorized ingredient not artificially colored."

The ingredients of the oleomargarine "purchased and received for sale" by Cliff are known and undisputed, and the brief and explicit statement by this court in the *McCray* case, above quoted, makes it a simple matter to determine whether a product of these known ingredients, looking "like butter of any shade of yellow," is subject to the tax of ten cents or to the tax of one-fourth of a cent per pound.

Was the color "imparted by an authorized ingredient not artificially colored"? If so, then the oleomargarine is "free from artificial coloration" and the tax is one-fourth of a cent per pound. Otherwise the tax is ten cents per pound.

In this case it is conceded that the resemblance to butter of a shade of yellow was due to the use of a small amount of palm oil in the oleomargarine. It is likewise conceded that the *natural* color of palm oil is orange-yellow. In other words, the color in palm oil belongs to the fat and has no existence separate and apart from the fat.

The only question in this case, therefore, is this: Is palm oil an "*authorized ingredient*" of oleomargarine? An affirmative answer to this question is found in the fact that palm oil is a vegetable oil, and that by the very terms of the second section of the oleomargarine act vegetable oil is specified as one of the ingredients of oleomargarine as defined

for the purposes of that act, and, as has been shown, vegetable oil and "coloring matter" are generically different and mutually exclusive.

The meaning of the term "artificial coloration," as used in the act, apparently seemed at one time just as simple and clear to the Internal Revenue Bureau as it did to this court in the *McCray* case and as it has always seemed to the writer. No more clear exposition of that phrase could be desired than that which was officially published by the Commissioner of Internal Revenue in Regulations No. 9, Revised June, 1902, shortly after the passage of the amendatory act (May 9, 1902), and was in force at the time plaintiff in error purchased and received for sale the ten-pound package of oleomargarine, and, as the writer understands, is still in force. On page 18 of those "Regulations" appears the regulation as to artificial coloration, as follows:

REGULATION AS TO ARTIFICIAL COLORATION.

> "If in the production of oleomargarine the mixtures or compounds set out in the law of 1886 are used, and these compounds are all free from *artificial coloration*, and no artificial coloration is produced by the addition of coloring matter as an independent and separate ingredient, a tax of one-fourth of one cent per pound only will be collected, although the finished product may look like butter of some shade of yellow. For example, if butter that has been *artificially* colored is used as a component part of the finished product oleomargarine (and that finished product looks like butter of any shade of yellow), as the oleomargarine is not free from *artificial* coloration the tax of ten cents per pound will be assessed and collected. But if butter absolutely free from *artificial* coloration, or cotton-seed oil free from *artificial* coloration, or any other of the mixtures or compounds legally used in the manufacture of the finished product oleomargarine has *naturally* a shade of yellow in no way procured by artificial coloration, and through the use of one or more of

> these unartificially-colored legal component parts of oleomargarine the finished product should look like butter of any shade of yellow, this product will be subject to a tax of only one-fourth of one cent per pound, as it is absolutely free from *artificial* coloration that has caused it to look like butter of any shade of yellow." (Italics are the Commissioner's.)

This "regulation as to artificial coloration" construes the term "artificial coloration" precisely as this court construed it in the McCray case and precisely also as the writer contends it should be construed in this case; for it is admitted that vegetable oils are "legally used in the manufacture of the finished product oleomargarine" and are "legal component parts of oleomargarine;" that palm oil is a vegetable oil, and that palm oil "has *naturally* a shade of yellow in no way procured by artificial coloration."

With what reason, then, can it be held that this "shade of yellow," which palm oil "naturally" has, becomes "artificial coloration" when imparted by the palm oil to oleomargarine? The reason given by the Commissioner of Internal Revenue in support of this change of view was that the quantity of palm oil used is "so minute and infinitesimal" that "it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and therefore that the oleomargarine so colored is not free from artificial coloration."

The court's opinion in this case seems to sanction the Commissioner's later view, and, as the writer respectfully submits, departs from the interpretation placed by the court in the *McCray* case upon the same statutory provisions.

The opinion of the court in this case apparently makes a distinction between coloration that might be caused by the use of what might be regarded as a *large* percentage of palm oil and coloration caused by what might be regarded

as a *small* or *minute* percentage of palm oil. In other words, while the court has held that the coloration of the Moxley oleomargarine purchased by Cliff was "artificial coloration" and subjected such oleomargarine to a tax of ten cents per pound, yet if the percentage of palm oil used had been *large* in the opinion of the Commissioner or of a jury or of the lower court (a jury being waived) the coloration due to its use would not have been held by the court to be "artificial coloration," and the tax would have been only one-fourth of a cent per pound.

Just where the line might be drawn between a *large* percentage and a *small* percentage of palm oil neither the Commissioner nor the court has stated. The honest manufacturer, therefore, guided by the wisest counsel having the court's opinion before him, and desiring to manufacture oleomargarine subject only to the one-fourth of a cent tax, could not foretell, if he used palm oil, whether his oleomargarine would be subject to a tax of ten cents or of one-fourth of a cent per pound. Moreover, if the present Commissioner were to rule that oleomargarine hereafter made containing, say, 5 per cent. of palm oil, was subject only to the one-fourth of a cent tax because that quantity of palm oil was in his opinion *large* and the resulting coloration therefore not "artificial," his successor in office might regard that quantity of palm oil as *small* and might forthwith proceed to make an asse-sment for unpaid tax to the amount of nine and three-fourths cents per pound, and in such case the manufacturer would have no legal defense against the assessment, if the construction of the law stated in the Commissioner's ruling August 11, 1902, above quoted, is sound.

The court's opinion seems to hold that coloration in oleomargerine is "artificial" when caused even by a *statutory*—that is, a *natural*—ingredient, if used in such *small* quantity as to suggest the inference that it was used substantially only for the purpose of imparting color to the finished product, while if what the court

should regard as a *large* quantity of the same ingredient were substituted for a like volume of any other statutory ingredient hitherto used (as, for instance, cotton-seed oil) and the avowed purpose of the substitution were thus to impart coloration to the finished product, the resulting coloration would not be "artificial"—that is to say, an intent to color which is inferred from the use of what may be regarded as a *small* percentage of palm oil makes the coloration "artificial" and subjects the oleomargarine to a tax of ten cents per pound, but an avowed intent to color by the use of what might be regarded as a *large* percentage of palm oil in lieu of a like volume of any other statutory ingredient does not make the coloration "artificial," and subjects the oleomargarine to a tax of only one-fourth of a cent per pound, because the palm oil would in that case form a substantial part of the body of the product.

Right here it may be in point to note that palm oil is a wholesome food product and might be used in oleomargarine in larger proportion without prejudice to the healthfulness of the oleomargarine. (Pr. Rec., 12.)

Can it be that Congress ever intended that the amount of the tax—that is, whether ten cents or one-fourth of a cent per pound—to be paid on oleomargarine should depend upon whether the quantity used of the material which causes a resemblance to butter of a shade of yellow were regarded by the Commissioner of Internal Revenue or by a jury or a court as a *small* or a *large* percentage of the volume of the finished product? If Congress had so intended, would it not have specified the percentage that must be used of any color-giving ingredient in order that the manufacturer should not lose the benefit of the lower tax if he desired to make oleomargarine that would be subject only to the lower tax, and in order that he might not unwittingly expose himself to punishment for violation of the law? Did not Congress intend that the amount of the tax per pound should depend

upon the *nature* of the material the use of which causes the oleomargarine "to look like butter of any shade of yellow"? Does the word "artificial" as used in the act refer to an uncertain quantity of a color-giving ingredient to be fixed only in the individual discretion of the Commissioner for the time being or by the verdict of a jury or the finding of a court?

Is it not more reasonable to hold that the word "artificial" refers rather to the *nature* of the material which imparts to oleomargarine a resemblance to butter of a shade of yellow, so that the manufacturer may proceed in his business *with definite certainty as to the amount of tax to be paid upon his finished product?*

In *Merritt v. Welsh*, 104 U. S., 694, it was held that the Treasury Department had no discretion but to classify the quality of sugar according to its color, although the color test had become entirely inadequate and although the color of the lower class was imparted in manufacture to the higher class *for the very purpose of evading the higher tax.* Speaking by Mr. Justice Bradley, the court said (p. 701):

> "The color standard has come to be a precarious one. Still, if the Government chooses to adhere to it, it is bound by it. If Congress, as it has done, adopt the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the custom-house to follow. As before said, Congress alone has the power to lay taxes and duties.
>
> "Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss; if they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the Government. If, in the case under consideration, a color standard is insufficient, a different one is ready to hand,—that of

the polariscope, or other chemical test. *If the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws; and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, 'Where law ends tyranny begins.'*"

And again (p. 704):

"If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department, or the courts, to take the part of legislative guardians, and, by construction, to make new laws which they imagine Congress would have made had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make. It may be that our tariff of duties is evaded by giving to sugars, in the process of manufacture, a low grade of color. If this be so, it is no more than every manufacturer does; namely, so to manufacture his goods as to avoid the burden of high duties, provided he can do it without injuring their marketability, or injuring it less than the duties involved. So long as no deception is practiced, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred. Heretofore, it has been thought desirable, in order to make sugars more marketable, to use artificial processes for bleaching them. The percolation of clay water through the mass was one of the means adopted. The sprinkling of refined syrups in the form of spray on the sugar in the centrifugals is another. If the manufacturer uses these bleaching processes in order to make his sugars more salable, why may he not omit to do so in order to render them less dutiable; nay, why may he not employ an extra quantity of molasses for that purpose? If after the sugars are

manufactured, especially after being put up in packages, coloring matter is artificially imposed, it might be a different matter."

In *Seeberger v. Farwell*, 139 U. S., 608, it was expressly held that the introduction of a few cotton threads into woolen cloth for the very purpose of having it classed as part wool goods, and thus to evade a higher duty laid on woolen goods, would prevent the collector from classifying the goods as woolen.

The Supreme Court, by Blatchford, J., referred to the proceedings below in the circuit court for the northern district of Illinois and approved the reasoning of the opinion of that court, saying (p. 610):

> "The court, in its opinion, said that the collector, in classifying the goods, evidently assumed that the purpose of mixing the cotton with the wool was to secure a low classification, and assumed that so small a quantity of cotton would not materially change the character of the goods, as merchandise, when offered for sale to consumers, and, therefore, looked upon the contention of the plaintiffs for a lower classification as an attempt to defraud the revenue, and accordingly imposed the higher duty; that, Congress having made special provision for a lower rate of duty upon goods when composed in part of wool *without naming how much of other material should enter into their composition in order to secure such lower rate of duty*, the court was of opinion that manufacturers and importers *had the right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate;* that, although the goods in question contained so small an amount of cotton that the ordinary dealer in them and the ordinary examiner would not detect the cotton without a close and careful examination, that did not change the legal right of the plaintiffs to bring their goods within the operation of the clause involved, by the admixture of even a small percentage of cotton, if they could do

so, and that goods made of 94 per cent. in bulk of wool and 6 per cent. in bulk of cotton fairly came within the description of goods composed in part of wool.

"We concur in this view, and the judgment is affirmed."

This decision was followed in Magone *v.* Luckemeyer, 139 U. S., 612.

In *United States v. Schoverling*, 146 U. S., 76, 81, it was held, following the *Merritt* case, that "the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gunstocks as a separate importation."

In *United States v. Irwin*, 78 Fed. Rep., 799, the circuit court of appeals for the second circuit, speaking by Circuit Judge Wallace, said (p. 801):

> "Upon the evidence in the record, we entertain no doubt that the importations in controversy were breech-loading shotguns, which before exportation were in a completed condition, ready for the market or for the sportsman's use, in number equal to that of the stocks or the barrels, but that the parts were detached, shipped in separate cases, and invoiced separately, to enable the importer to enter them as invoiced, escape the payment of the duty upon guns, and, after importation, reassemble the parts. We are to consider to what extent this was a legitimate or a successful effort to avoid the payment of the higher duties.
>
> "*It is a well-settled doctrine that intent is not an element in determining the proper classification of imported articles, and that merchants are at liberty so to manufacture and so to import their goods as to subject them to the lowest possible duties under the tariff laws.*"

And again, after referring to some of the decisions of this court (p. 802):

> "Applying these principles to the present case, we cannot escape the conclusion that if the articles in

> controversy were not shotguns, in the condition in which they were imported, they were not dutiable as such, notwithstanding they had been shotguns previously, and could readily be again transformed into shotguns, and notwithstanding they had been taken apart and imported in fragments *merely for the purpose of escaping the duty upon shotguns.*"

II.

THE RULE THAT ONE WHO CLAIMS THE BENEFIT OF AN EXCEPTION MUST MAKE IT CLEAR THAT HE COMES WITHIN ITS SCOPE HAS NO APPLICATION TO THIS CASE.

DOUBT, IF ANY, IN THIS CASE SHOULD BE RESOLVED IN FAVOR OF THE PLAINTIFF IN ERROR. THE OLEOMARGARINE LAW IS A REVENUE LAW, AND SHOULD BE LIBERALLY INTERPRETED IN FAVOR OF THE TAX-PAYER.

FURTHERMORE, THIS IS A CRIMINAL CASE, AND FOR THAT REASON ALSO DOUBT SHOULD BE RESOLVED IN FAVOR OF THE PLAINTIFF IN ERROR. NOT ONLY MUST THE GOVERNMENT SHOW BY THE WEIGHT OF EVIDENCE THAT THE DEFENDANT HAS DONE THE THING CHARGED, BUT IT MUST MAKE IT CLEAR BEYOND A REASONABLE DOUBT THAT THE THING CHARGED AND DONE WAS A VIOLATION OF THE LAW.

The proviso of the eighth section of the oleomargarine law as amended is really AN INDEPENDENT ENACTMENT.

In *Georgia R. R. & Banking Co. v. Smith*, 128 U. S., 174, in discussing the construction of a proviso in the charter of the Georgia Railroad and Banking Company, this court, speaking by Mr. Justice Field, said:

> "The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it,

> or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

See also *United States v. Babbitt*, 1 Black, 55; *Savings Bank v. Collector*, 3 Wall., 495.

Section 8 of the original oleomargarine law, passed August 2, 1886, was as follows:

> "SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of two cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

Now, when Congress came to amend this section by the act of May 9, 1902, all that was done was to change the word "two" to "ten" and to add after the first sentence in the section these words:

> "*Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound."

Is this not a perfect example of the "common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided'"? Is not the office of the word "provided" that of "simply serving to separate or distinguish the different paragraphs or sentences," thus classifying oleomargarine for the purpose of Federal taxation into two classes—(*a*) oleomargarine not free from artificial coloration, upon which ten cents per pound must be paid, and (*b*) oleomargarine free from artificial coloration, upon which only one-fourth of a cent per pound is to be paid?

But even if the proviso in section 8 as amended were to be regarded as an "exception" to the preceding part of section 8, nevertheless it should be construed liberally in favor of the manufacturer and tax-payer.

In *Eidman v. Martinez*, 184 U. S., 578, a case requiring the construction of the New York inheritance tax law, this court, speaking by Mr. Justice Brown, said:

> "It is an old and familiar rule of the English courts applicable to all forms of taxation, and *particularly special taxes*, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of exception *confining the operation of the duty*, (*Warrington v. Furbor*, 8 East, 242, 247; *Williams v. Sangar*, 10 East, 66, 69; *Denn v. Diamond*, 4 B. & C., 243, 245; *Tomkins v. Ashby*, Y. B. & C., 541; *Doe v. Snaith* 8 Bing., 146, 152; *Wroughton v. Turtle*, 11 Mees. & W., 561, 567; *Gurr v. Scudds*, 11 Exch., 190), though the rule regarding exemptions from general laws imposing taxes may be different (*Cooley on Taxation*, 145; *In matter of Enston*, 113 N. Y., 174, 177)."

> [Note that the oleomargarine law is not a "general law imposing taxes," but a law imposing "special taxes."]

> "We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally in-

terpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language, (*Hartranft v. Wiegmann*, 121 U. S., 609; *American Net & Twine Co. v. Worthington*, 141 U. S., 468; *United States v. Wigglesworth*, 2 Story, 369; *Powers v. Barney*, 5 Blatchford, 202)."

In *Warrington v. Furbor*, 8 East, 242, 245, Lord Ellenborough, Ch. J., says:

> "Where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out, and we should give a liberal construction to words of exception *confining the operation of the duty*."

DOUBT, IF ANY, IN THIS CASE SHOULD BE RESOLVED IN FAVOR OF THE PLAINTIFF IN ERROR. THE OLEOMARGARINE LAW IS A REVENUE LAW, AND SHOULD BE LIBERALLY INTERPRETED IN FAVOR OF THE TAX-PAYER.

In *United States v. Wigglesworth*, 2 Story, 369, Mr. Justice Story, in giving reasons for holding that the revenue act of 1841 did not intend to levy a permanent tax on indigo, said:

> "My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. *In every case, therefore, of doubt* such statutes are construed most strongly against the Government, and in favor of the subjects or citizens, because burdens are not to be imposed or presumed to be imposed, beyond what the statutes expressly and clearly import. *Revenue statutes are in no just sense remedial laws*, or laws founded upon any public policy, *and therefore are not to be liberally construed.*

> Hence in the present case, if it be a matter of rea. doubt whether the intention of the act of 1841 was to levy a permanent duty on indigo, that doubt would absolve the importer from paying the duty beyond the period when it would otherwise be free."

Hartranft v. Wiegmann, 121 U. S., 609, 616, was an action to recover duties alleged to have been illegally exacted. The question in dispute was the classification of certain shells, the plaintiff contending that they were exempt from duty by provision of the free list, while the Government asserted that they were subject to a duty of 25 per cent. *ad valorem*. It was held that the shells were exempt from duty. The court, speaking by Mr. Justice Blatchford, said :

> "We are of the opinion that the decision of the circuit court was correct. But if the question were one of doubt, the doubt would be resolved in favor of the importer 'as duties are never imposed on the citizen upon vague or doubtful interpretation.' (*Powers v. Barney*, 5 Blatch., 202; *United States v. Isham*, 17 Wall., 496, 504; *Gurr v. Scudds*, 11 Exch., 190, 191; *Adams v. Bancroft*, 3 Sumn., 384.)"

In *United States v. Isham*, 17 Wall., 496, the court said :

> "If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in *Gurr v. Scudds*, 11 Exch., 191, 'a tax cannot be imposed without clear and express words for that purpose,'" citing *Conroy v. Warren*, 3 Johns. Cas., 259.

As the practical question involved in the pending issue is really a question of classification, a case specially in point is that of *The American Net & Twine Co. v. Worthington, coll'r*, 141 U. S., 468. That was a suit to recover excess duties paid under protest on gilling twine (subject to 25 per cent. duty) which had been classified by the customs officials as linen thread (subject to 40 per cent. duty) and assessed at

the higher rate. In sustaining the claim of the importer the Supreme Court said:

> "We think the intention of Congress that these goods should be classified as 'gilling twine' is plain; but were the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of Congress to impose a higher duty should be expressed in clear and unambiguous language."

Citing—
United States v. Isham, 17 Wall., 496.
Hartranft v. Wiegmann, 121 U. S., 609.
Gurr v. Scudds, 11 Exch., 190.

In *Bensinger v. United States*, 192 U. S., 38, 55, certain figures representing various saints and two figures of adoring angels had been specially imported into the port of New York in good faith for the use and by order of certain religious societies. The importers claimed the figures were entitled to free entry under paragraph 649 of the tariff act of 1897. The appraiser had returned them as "church statues composed of plaster of Paris decorated," or as "articles and wares composed wholly or in chief value of earthy or mineral substances not specially provided for," and the collector had assessed upon them a duty of 45 and 35 per cent. *ad valorem* under paragraphs 97 and 450 of the same act.

In deciding that these figures were entitled to free entry under paragraph 649 the court, speaking by Mr. Justice Peckham, at page 55, uses this language:

> "This provision of the statute [provision for free entry] should be liberally construed in favor of the importer, and if there were any fair doubt as to a true construction of the provision in question, the court should resolve the doubt in his favor. (*American Net & Twine Co. v. Worthington*, 141 U. S., 468; *United States v. Wigglesworth*, 2 Story, 369; *Rice v. United States*, 53 Fed. Rep., 910.)"

In *Powers v. Barney*, 5 Blatch., 202, Mr. Justice Nelson said:

> "In cases of serious ambiguity in the language of the act or doubtful classification of articles, the construction is to be in favor of the importer, as duties are never imposed on a citizen upon vague or doubtful interpretation."

In *Adams v. Bancroft*, 3 Sumn., 384, Mr. Justice Story said:

> "Laws imposing duties are never construed beyond the natural import of the language, and duties are never imposed upon the citizens upon doubtful interpretation, for every duty imposes a burden on the public at large, and is construed strictly and must be made out in a clear and determinate manner from the language of the statute."

Rice v. United States, 53 Fed. Rep., 910, cited with approval by this court, *supra*, is thus stated in the head-note:

> "Revenue statutes, including those fixing duties on imports are neither remedial laws nor laws founded upon any permanent public policy and should be construed most strongly against the Government, for burdens should not be imposed on the taxpayer beyond what such statutes expressly and clearly import."

In re Southern Pacific Co., 82 Fed. Rep., 311, was an application for a review of the decision of the board of United States general appraisers relative to the classification for duty of two importations of creosote merchandise. The appellant asserted that the liquid creosote was a product of coal tar and entitled to free entry, while the appellee declared it was a distilled oil and subject to a duty of 25 per cent. *ad valorem*. The court, Morrow, circuit judge, in holding that the liquid creosote was not a distilled oil, but was a product of coal tar, said:

> "Even if I were in doubt as to which of these paragraphs [of the tariff act] applied, such doubt

under the rule of construction relating to tariff acts, would have to be resolved in favor of the importer."

In *Hempstead & Son v. Thomas*, 122 Fed. Rep., 538, 59 C. C. A., 342, the matter in dispute was the classification of tungsten ore. The court, speaking by Buffington, district judge, said:

> "The question here involved is whether this ore should be classified under section 614 (free list) of the tariff of 1897 (act July 24, 1897, c. 11, 30 Stat., 199 [U. S. Comp. Stat. 1901, p. 1685]), which embraced 'minerals, crude or not advanced in value or condition by refining or grinding, or by other process not specifically provided for in this act,' or under section 183, which covers 'metallic mineral substances in a crude state and metals unwrought, not specially provided for in this act, twenty per cent. *ad valorem*.' In determining that question the canon of construction is that *tax laws, being in derogation of common right, must be construed strictly.* (*Hartranft v. Wiegmann*, 121 U. S., 615; 7 Sup. Ct., 1240; 30 L. Ed., 1012.) The burden of showing the ore is covered by section 183 is upon the Government, and, if its classification is open to a construction which would as well place it on the free list, the course most favorable to the importer must be adopted (*American Co. v. Worthington*, 141 U. S., 468; 12 Sup. Ct., 55; 35 L. Ed., 821), 'as duties are never imposed on the citizen upon vague or doubtful interpretation' (*Hartranft v. Wiegmann, supra*)."

To the same effect are the English cases.

In *Williams v. Sangar*, 10 East, 66, 69 (case of turnpike tolls), Lord Ellenborough says:

> "In the construction of these tax acts we must look at the strict words, however we may sometimes lament the generality of the expression used in them; but we must construe those words according to their plain meaning with reference to the subject-matter."

In *Denn v. Diamond*, 4 B. & C. (case of an *ad valorem* duty on sales), Bayley, J., says:

> "It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language."

In *Tompkins v. Ashby*, 6 B. & C., 541, 543 (case of a stamp duty), Lord Tenterden, Ch. J., says:

> "Acts of Parliament imposing duties are so to be construed as not to make any instruments liable to them unless manifestly within the intention of the legislature."

In *Doe v. Snaith*, 8 Bing., 147, 152 (case of a stamp duty), Tindal, Ch. J., says:

> "As all stamp acts, being a burden on the subject, must be clearly expressed, wherever they impose the burden, I should say that even if there were doubt, *we should take the smaller sum.*"

In *Wroughton v. Turtle*, 11 Mees & W., 561, 567, Park, B., says:

> "It is a well-settled rule of law that every charge on the subject must be imposed by clear and unambiguous words."

In *Marquis of Chandos v. Com. of Inland Revenue*, 6 Exch., 464, 479, Pollock, C. B., says:

> "It is a well-established rule in the construction of revenue acts that a duty cannot be imposed on the subject except by clear words. The meaning of the legislature must be distinctly made out *from the terms of the statutes.*"

In *Gurr v. Scudds*, 11 Exch., 190, 192, Pollock, C. B., says:

> "If there is any doubt as to the meaning of a stamp act, it ought to be construed *in favor of the subject*, because a tax cannot be imposed without clear and express words for that purpose."

In *Partington v. Attorney Gen.*, L. R., 4 H. L., 100, 122, Lord Cairns says:

> "As I understand the principle of all fiscal legislation, it is this: 'If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, *cannot bring the subject within the letter of the law, the subject is free*, however apparently within the spirit of the law the case might otherwise appear to be.' In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute."

Dwarris, at page 742, says:

> "Statutes made for the advancement of trade and commerce and to regulate the conduct of merchants ought to be perfectly clear and intelligible to persons of their description. By the use of ambiguous clauses in laws of that sort, the legislature would be laying a snare for the subject, *and a construction which conveys such an imputation ought never to be adopted.* Judges, therefore, where clauses are obscure, will lean against forfeitures, leaving it to the legislature to correct the evil, if there be any. * * * In like manner in the revenue laws, where clauses inflicting pains and penalties are ambiguously or obscurely worded, the interpretation is ever in favor of the subject; 'for this plain reason,' said Heath, J., in *Hubbard v. Johnson*, 3 Taunt., 77, 'that the legislature is ever at hand to explain its own meaning and to express more clearly what has been obscurely expressed.'"

* * * * * * *

> "It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any am-

> biguity found, the construction must be in favor of the public, because it is a general rule that when the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shown."

FURTHERMORE, THIS IS A CRIMINAL CASE, AND FOR THAT REASON, ALSO, DOUBT SHOULD BE RESOLVED IN FAVOR OF THE DEFENDANT. NOT ONLY MUST THE GOVERNMENT SHOW BY THE WEIGHT OF EVIDENCE THAT THE DEFENDANT HAS DONE THE THING CHARGED, BUT IT MUST MAKE IT CLEAR BEYOND A REASONABLE DOUBT THAT THE THING CHARGED AND DONE WAS A VIOLATION OF THE LAW.

In *United States v. Wiltberger*, 5 Wheat., 76, in deciding that the courts of the United States have no jurisdiction of the crime of manslaughter committed by a master upon a seaman on board a vessel of the United States lying in a small river in China 35 miles from its mouth by virtue of the act of April 30, 1790, giving jurisdiction for the punishment of certain crimes against the United States and providing for the punishment of manslaughter committed on the high seas, Marshall, C. J., said:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative and not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. But this is not a new or independent rule which subverts the old. It is a modification of the ancient maxim and amounts to this, that though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim

is not to be applied so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated."

This last case was cited in *U. S. v. Harris*, 177 U. S., 305, 310, where it was held that a receiver of a railroad is not within the letter or the spirit of the provision of the act of March 3, 1873, c. 252, 17 Stat., 584, entitled "An act to prevent cruelty to animals while in transit by railroad or other means of transportation within the United States," and which provided that no railroad company within the United States conveying live stock from one State to another should confine the same in cars for a longer period than forty-eight consecutive hours without resting and feeding.

In *Sarlls v. U. S.*, 152 U. S., 570, it was decided in this case that lager beer is not a "spirituous liquor" within the meaning of that term as used in the act prohibiting the introduction and sale of "ardent spirits," "spirituous liquors and wine," into the Indian country.

United States v. Watts, 1 Bond, 580; Fed. Cas. 16653, was an action of debt by the United States to recover a tax or

duty claimed to be due under a law of 1862 levying a tax on legacies. In construing the law, Leavitt, district judge, said:

> "The statute in question abounds in penalties for its violation. The defendant in this action is subject to a penalty for refusing payment of the duty or tax claimed on these legacies, if such duty or tax is legally chargeable. In accordance with the well-settled rules of construction, statutes of this character cannot be so construed as to extend their meaning beyond the clear import of the words used. It is the duty of the courts of the Union undoubtedly, so far as they are vested with any agency in carrying out the financial purposes of the Government, fairly to enforce the revenue laws of the country, and see that they are not fraudulently evaded. But they are not at liberty, by construction or legal fiction, to enlarge their scope to include subjects of taxation not within the terms of the law. It belongs exclusively to the legislative department of the Government to define and declare upon what subjects taxes shall be imposed, and to provide the agencies by which they shall be assessed and collected. And however expedient it may seem, under certain circumstances, to invade the proper domain of the legislature by judicial construction, it is clearly in conflict with the theory of the Government."

In *United States v. Distilled Spirits*, 10 Blatch., 428, 433, in construing a forfeiture clause of the internal-revenue act of July 20, 1868, Woodruff, circuit judge, said:

> "I concur with those who hold that the forfeiture applies only to cases for which no specific penalty or punishment is imposed by other sections. The 96th section clearly admits of that interpretation. *The fact that intelligent and fair minds have been in doubt, and have differed on the subject*, and an examination of the section itself, both concur to show, that, at most, the construction claimed by the Government, though it be possible, *is doubtful*. In construing a severe statute declaring a heavy forfeiture (and according to one construction claimed,

for small offenses), it is just to say that those who are called upon to conduct their business affairs in view of all its provisions ought to be fairly apprised of its requirements and its penalties, of whatever kind. They are bound to know the law, but law-makers owe to them the duty to make the law intelligible; and those whose business it is to construe a law which is of doubtful or double meaning *should not incline to the harshest possible meaning when it is obvious that those to whom it is to be applied may well have been led to trust in another, which is less severe, but equally satisfying its terms.*"

Judge Cooley, in quoting the above, says that these remarks "apply with great force to nearly all the Federal revenue laws."

Cooley on Taxation, 2d ed., 269.

May it not be said with reason and force that the manufacturer, after reading the eighth section of the amended act and after reading the official interpretation of the *proviso* of that section as contained in the department "REGULATION AS TO ARTIFICIAL COLORATION," was justified in thinking that the oleomargarine here in question was subject only to the tax of one-fourth of a cent per pound? And may it not reasonably be said that the plaintiff in error had no reason to suppose that he was violating the law in purchasing and receiving for sale the ten-pound package properly branded and marked and stamped tax-paid at the rate of one-fourth of a cent per pound? If so, then should the court "incline to the harshest possible meaning when it is obvious that those to whom it is to be applied may well have been led to trust in another, which is less severe, but equally satisfying its [the law's] terms"?

III.

THE AMOUNT OF THE REVENUE TAX PAID ON OLEOMARGARINE BEARS NO CAUSAL RELATION TO THE ACCOMPLISHMENT OF THE PURPOSE OF THE ACT, "TO PREVENT THE SALE OF OLEOMARGARINE AS AND FOR BUTTER."

In its opinion, the court says:

> "Bearing in mind also that one of the purposes of this legislation was to prevent the sale of oleomargarine *as and for butter*, it must be held that when any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to 'look like butter of any shade of yellow,' it is an artificial coloration."

By the language of the first clause of this sentence the writer understands the court to mean that one of the purposes of the act was to prevent deception by surrounding the sale of oleomargarine with such safeguards that no one could buy oleomargarine under the impression that he was getting butter. If this interpretation of the court's language is correct, then it is respectfully submitted that the conclusion of the court stated in the above sentence is clearly a *non sequitur*. For under the law the package of oleomargarine free from artificial coloration, and therefore stamped tax-paid at the rate only of one-fourth of a cent per pound, is required to be marked, stamped, and branded in the same manner as a package of oleomargarine taxed at the rate of ten cents per pound, with the single exception of the difference of figures on the stamps. The marking, stamping, and branding, as required by the law, will be no less effective to prevent deception on account of the smaller denomination of the stamps used. The stamps of the smaller denomination will be just as conspicuous as those of the larger denomination, and the

marking and branding just as plain and effective in the one case as in the other.

In this case the Government affirmatively disavowed any claim that Cliff had offered the article for sale as butter (Pr. Rec., p. 10).

If, on the other hand, as the writer does not believe, the language, "Bearing in mind also that one of the purposes of this legislation was to prevent the sale of oleomargarine as and for butter," meant that the purpose was to prevent deception *by preventing altogether the sale* of oleomargarine of such quality and color as to be useful for family consumption, then it would seem to be clear upon principle and authority that, in so far as the purpose of Congress was to *prohibit* the sale of oleomargarine, that purpose should not be accepted by this court as its guide for the interpretation of the act.

In passing upon the constitutionality of the oleomargarine law of 1886, in *In re Kollock*, 165 U. S., 526, this court, speaking by Chief Justice Fuller, said:

> "The act before us is, on its face, an act for levying taxes, and although it may operate, in so doing, to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue."
>
> This was quoted with approval in *McCray v. United States, supra.*

Viewing and construing the act as an act for the raising of revenue, the numerous cases already cited show that where there is doubt the act should be interpreted favorably to the manufacturer and tax-payer, *limiting the amount of the tax to the smaller rate unless it is clear that the higher rate applies to his product;* and the fact that the court deemed it necessary in this case to take into account the incidental purpose of the act to prevent deception in the sale of oleomargarine seems to indicate somewhat definitely that in the court's mind *there was a doubt in this case* as to whether the lower

or the higher rate of tax applied to the oleomargarine purchased and received for sale by the plaintiff in error. In thus citing the purpose of the act, to prevent deception, as a reason for resolving doubt against the manufacturer and taxpayer, the court in effect treated the act, not as an act for raising revenue, but as a remedial act. Since, however, the branding, marking, and stamping of the package with stamps of the lower denomination will be as effective to prevent deception as if the package were stamped with stamps of the higher denomination, it seems apparent that the accomplishment of this purpose of the act—to prevent deception—is not at all incompatible with the application of the rule that in construing revenue laws doubt should be resolved in favor of the tax-payer.

Moreover, if the act be regarded from the view-point of its remedial purpose, the imposition of the ten-cent tax in a case of doubt might fairly be considered as *in the nature of a penalty*, since the tax of one-fourth of a cent per pound, with the branding, marking, and stamping in accordance with law, would as surely accomplish the purpose of preventing deception; and the imposition of a penalty by construction, as it were, ought not to be favored, especially where the act, as in this case, provides specific penalties for its violation.

Again, viewing the act in its remedial aspect, a construction that would impose the ten-cent tax in case of doubt, where the remedial purpose would be as well effected by the smaller tax, would substantially impute to Congress the intention, under the guise of a tax levied to raise revenue, to inflict a destructive penalty upon the manufacture of an article the commercial character of which is thoroughly established and the wholesomeness of which is abundantly attested by the enormous growth in its use in every civilized country during the last twenty-five years. (*Schollenberger v. Pennsylvania*, 171 U. S., 1, 8–12.) Such, it is respectfully submitted, should not be presumed to have been the intention of

Congress, and if there is any reasonable interpretation of the act which would avoid imputing such an intention to Congress that interpretation, it seems to the writer, should be adopted.

IV.

If, by the eighth section of the amended act, Congress intended what this petition contends for as being the proper construction of that section, it would seem to be impossible that Congrss intended, by the fourteenth section of the amended act, to confer upon the Commissioner of Internal Revenue power to defeat the intention expressed in the eighth section. If, by the eighth section, Congress imposed a tax of only one-fourth of a cent per pound upon such oleomargarine as that which was purchased and received for sale by the plaintiff in error, it would seem to be a legal solecism to say that, under the fourteenth section, the Commissioner of Internal Revenue may impose a tax of ten cents per pound upon such oleomargarine.

All the cases cited in the Government's brief, in discussing the fourteenth section, go to the point that Congress may confer upon an executive officer the power to ascertain and determine facts and to *apply the law* to the facts when ascertained. But such a power is quite different from the power to determine *finally* what is the law—which latter is the power in effect claimed for the Commissioner of Internal Revenue by the Government in this case. Here the facts are entirely undisputed, and the question presented is purely a question of law, namely, whether resemblance to "butter of any shade of yellow," caused by the admixture of palm oil—a vegetable oil—in the manufacture of oleomargarine, is "artificial coloration" within the meaning of the amended act.

In *U. S. v. 200 Barrels of Whiskey*, 95 U. S., 571, 576, holding that a particular construction of the internal-revenue

law by the Commissioner of Internal Revenue was unwarranted, the court, by Chief Justice Waite, said:

> "The regulations of the Department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions."

The invalidity of the disputed clause in the fourteenth section of the amended act, if that clause means what the Government contends that it means, seems to be established by the decision in *U. S. v. Eaton*, 144 U. S., 678, 687–8, where the court, speaking by Justice Blatchford, said:

> "It was said by this court in *Morrill v. Jones*, 106 U. S., 466, 467, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into affect what Congress has enacted. Accordingly, it was held in that case, under § 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States."
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> * * * * * *
>
> "It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under § 18 of the act."

In view of these considerations and authorities, it is earnestly urged that a rehearing be granted and opportunity be given for an oral argument in this case, to be confined to the question arising under the oleomargarine law itself and without attempting to reopen discussion as to the constitutionality of that law.

Respectfully submitted.

JOHN MAYNARD HARLAN,
Attorney and Counsel for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

I, the undersigned, attorney and counsel for said August Cliff, plaintiff in error, do hereby certify that in my opinion there is just ground in point of law for the allowance of a rehearing in said cause.

JOHN MAYNARD HARLAN,
Attorney and Counsel for Plaintiff in Error.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

AUGUST CLIFF, *Plaintiff in Error*,
v.
THE UNITED STATES. } No. 19.

In Error to the District Court of the United States for the Northern District of Illinois.

[October 24, 1904.]

Mr. Justice BREWER delivered the opinion of the court:

August Cliff was convicted in the district court of the United States for the northern district of Illinois of a violation of section 11 of the act of August 2, 1886, (24 Stat., 209), amended May 9, 1902, (32 Stat., 193). A judgment for fifty dollars, as prescribed by the section, was entered with an order for collection by execution. That judgment was brought directly to this court by writ of error. The constitutionality of the oleomargarine legislation and the right to waive a trial by jury in petty criminal offenses were affirmed in *McCray v. United States*, 195 U. S. 27, and *Schick v. United States*, *id.*, 65. Nothing need be added to the opinions in those cases on these questions.

There is in this case a further question. Section 2 reads:

> "SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neu-

tral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

In section 8 is this provision:

"SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound."

By section 14 the Commissioner of Internal Revenue

"is authorized to decide what substances, extracts, mixtures or compounds, which may be submitted for his inspection in contested cases, are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health."

Defendant was charged with having knowingly purchased and received for sale "certain oleomargarine which had not been stamped according to law—that is to say, ten pounds of a mixture and compound composed, as he the said August Cliff well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt and palm oil (which said last-named ingredient, to wit, palm oil, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow), which said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid by William J. Moxley."

It was shown that the tax of ten cents per pound had not been paid, that the package contained ten pounds, that its

ingredients and their proportions were: Three pounds of oleo oil; one pound and twelve ounces of neutral lard; two pounds of cotton-seed oil; one pound and fourteen and a half ounces of milk; one pound and four ounces of salt; one and one-half ounces of palm oil. In other words, out of one hundred and sixty ounces, only one and one-half ounces were palm oil. There was introduced in evidence a ruling of the Commissioner of Internal Revenue as follows:

> "This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of ten cents per pound."

Now the contention is that Congress having by section 2 named the possible ingredients of oleomargarine, the coloring given to a compound of some or all by the use of one of the named ingredients is a natural coloring, and not an artificial coloration subjecting to a tax of ten cents per pound. In order that the precise contention may be understood we quote the following from one of the briefs filed for plaintiff in error:

> "By parity of reasoning, when one is speaking of oleomargarine, natural coloration means a coloration due to a natural ingredient of oleomargarine, and to find out whether a certain ingredient is a natural ingredient of oleomargarine, we turn to the statute which defines the nature of oleomargarine. If the color-giving ingredient be a natural, that is, a statutory ingredient of oleomargarine, then how can it be truly said that the color caused by such ingredient is 'artificial coloration' merely because the quantity of such ingredient used is small or even minute, and the purpose of its use is to impart the desired color?

> Howsoever minute may be the quantity of palm oil used, it is none the less a vegetable oil, a statutory, or, so to speak, a natural ingredient of oleomargarine, and displaces in the finished product an equal volume of some other statutory ingredient of oleomargarine, as for instance, cotton-seed oil. The statute confers no power upon the Commissioner to prescribe the formula for the manufacture of oleomargarine, or the proportion of the different ingredients, or to exclude any ingredient except upon the ground of its being deleterious to health. But does not the government, in effect, assume such power to be in the Commissioner when, by reason of his arbitrary classification, based upon the quantity of palm oil used, it requires a tax of ten cents per pound upon oleomargarine containing a small or minute proportion of palm oil, while if the percentage used of that oil were large enough to constitute what the Commissioner would regard as a substantial part of the finished product, it is conceded that the tax would be only one-fourth of a cent per pound?"

We do not undervalue the force of this argument, but, as applied to this case, hold that it cannot prevail. It is true that under the last clause of section 2 oleomargarine includes "all mixtures and compounds" of the substances named, "made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter," and that palm oil is a vegetable oil, one of those substances. But in this enumeration Congress included not only those substances which, entering into the composition of oleomargarine, make it suitable for food, and, so to speak, form its body, but also others used only for coloring. After naming some it adds specifically, "and other coloring matter." The purpose in so including "coloring matter" is obvious. It was to prevent excluding from the operation of the statute anything in its nature oleomargarine by the addition of a substance not in reality an ingredient, but serving substantially only the purpose of coloring the product to cause it to look like butter. The fact that one of the ingredients of this compound is palm oil does not show that such oil does anything else than color the product composed of other ingredients, and if it does

substantially only this it is rightfully styled an artificial coloration Otherwise the proviso practically nullifies the body of the section. For "other coloring matter" includes all coloring matter, at least all of the nature of those named; and hence the addition of any coloring matter would produce only a natural and not an artificial coloration, and thus relieve the product from the ten cent tax. It will be noted that the regular tax imposed upon oleomargarine by section 8 is ten cents a pound, the exception thereto being stated in the proviso, and a party who claims the benefit thereof must make it clear that his oleomargarine is within its scope. That exception is "when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow." Bearing in mind also that one of the purposes of this legislation was to prevent the sale of oleomargarine as and for butter, it must be held that when any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to "look like butter of any shade of yellow," it is an artificial coloration.

Whether the Commissioner of Internal Revenue has all the authority which is in terms committed to him by section 14 need not be determined. The letter containing his ruling was admitted in evidence without objection. Irrespective of such ruling, and upon the other testimony, the judge who tried the case, and whose decision must be considered as equivalent to the verdict of a jury, could rightfully have found that this package of oleomargarine was artificially colored by the small amount of palm oil used in its manufacture. A witness testified that he called at the place of business of the defendant, "and found this ten-pound package of oleomargarine, which had been colored with palm oil to a very decided shade of yellow, like natural June butter, bearing a tax paid stamp of one-quarter of a cent a pound." Other witnesses testified to the exact per cent. of palm oil used in the preparation of the package. One said that "the article so manufactured was according to a formula used in the course of business, with the exception of the palm oil. It is what we call the 'Daisy grade,' the lower grade. It is a substitute for butter." Another testified that "a very small proportion of palm oil is necessary only to produce what is considered a desirable color in oleomargarine. The color of palm oil is a reddish yellow. Its natural color is such

that it may be used to make oleomargarine or white substances to look like butter." Further, the defendant offered quite an amount of testimony, which was received by the court and afterwards on motion stricken out as irrelevant and immaterial. Included in this was that of the secretary of the manufacturer, who testified that "before July 1, 1902, we used only the Wells-Richardson improved butter color to produce an artificial coloration. Since that date we have used the same article. We have used some palm oil. We used that for a few days only until the Commissioner of Internal Revenue ruled that its use would subject the product to the ten cent tax."

The verdict of a jury is conclusive upon a question of fact unless plainly against the evidence. The same weight, as we have said, must be given to the finding of a court, and upon the testimony received without objection a finding that this palm oil served substantially only to color the product cannot be disturbed. Indeed the fact was made certain by the testimony offered by the defendant, although that testimony was afterwards stricken out by the court as immaterial.

We see no error in the record, and the judgment is *affirmed*.

The CHIEF JUSTICE, Mr. Justice HARLAN, and Mr. Justice PECKHAM dissented.